Supreme Court, U. S.
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No. 80-369

IN THE

Supreme Court of the United States

October Term, 1980

ALFRED AVINS,

Petitioner,

v.

JAMES P. WHITE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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SUMMARY OF THE ARGUMENT

(Numbers Correspond to Petitioner's Numbered Questions Presented)

1-6. None of the petitioner's first six questions presented, all of which concern the rule of *New York Times v. Sullivan,* warrant review. The alleged defamatory comments concern a "public matter" (accreditation of a law school) about a "public figure" (the founder, dean, faculty member, and member of board of trustees of the law school), and were made by a person (ABA consultant on accreditation matters) exercising an important societal function (overseeing accreditation of law schools), which requires expression of candid views and no self-censorship. All these areas have been previously considered by this Court. Furthermore, to the extent that the alleged comments were made in a non-traditional type media setting, the alleged defamatory comments involved educational matters which this Court has previously ruled to be Constitutionally protected, even if made in a private setting.

7. The Court of Appeals did not invade the province of the jury. It did not make any finding of fact contrary to the jury. It did, however, hold certain matters were, as a matter of law, not for jury consideration. In any event, because of Constitutional overtones in defamation cases, appellate courts have a wider latitude for record review.

8. There was no Rule 51 waiver of any objection to the jury charge. Defendant's (respondent's) position had been clear throughout the entire course of litigation and further objection would have been unavailing.

9. This Court and the Circuit Courts hold that when a general verdict is based on more than one claim, one of which has been improperly submitted to the jury, a new trial is required.

10. The proximate cause standard applied below was consistent with federal law and would not result in dif-

fering verdicts from state to state. It was, therefore, correctly applied.

STATEMENT OF THE CASE

A. Procedural History

This tort action was originally filed by petitioner in March, 1976, in the Delaware Superior Court and removed to the District Court of the District of Delaware on grounds of diversity of citizenship. Petitioner alleged defamation, interference with advantageous relations and intentional infliction of emotional distress. After respondent's motion for summary judgment was denied, the case was tried before a jury which returned a $50,000 verdict for petitioner on the defamation claim and a verdict for respondent on the other claims. Respondent filed post-trial motions for judgment notwithstanding the verdict, new trial or remittitur. These motions were denied, and respondent appealed to the Court of Appeals for the Third Circuit. The Third Circuit affirmed the jury's verdict in favor of respondent. However, it reversed the verdict in favor of petitioner on the defamation claim. A new trial was ordered on one of the alleged grounds of defamation and judgment was entered for respondent on two of petitioner's allegations of defamation.

On September 8, 1980, petitioner filed a writ of certiorari to the United States Court of Appeals for the Third Circuit. This is respondent's brief in opposition.

B. Statement of the Facts Relevant to the Issues Presented for Review

This case concerns the struggle of the Delaware Law School (DLS) to secure provisional accreditation by the American Bar Association (ABA) so that DLS' first graduating class would be eligible to take bar examinations. Provisional approval, as governed by the ABA standards

is granted by the ABA House of Delegates which ordinarily accepts the recommendation of the Council of the Section of Legal Education and Admissions to the Bar (herein the Council) and its Accreditation Committtee. The Council and Accreditation Committee act on reports of teams which inspect applying schools. The Council and Accreditation Committee meet twice a year to consider these reports, at which time representatives of the inspected schools have the opportunity to appear and comment. The reports are considered confidential and are only distributed to the applying school's dean and members of the Council and Accreditation Committee. The administrative duties of the Council are carried out by a consultant who is employed on a full-time basis (G16-18; K192-193).[1]

Petitioner, Alfred Avins, is the founder and first dean of DLS. He was, at all times relevant, also a member of the faculty and the board of trustees. Respondent, James White, was, at all times relevant, Consultant[2] to the Council. He was also, on two occasions, a member of inspection teams which examined DLS.

Delaware Law School was founded in 1971 by Avins. On November 12, 1973, Avins requested an inspection to determine whether DLS substantially complied with the appropriate standards.

The inspection was held January 14-16, 1974. Members of the inspection team were Millard Ruud (Ruud), the outgoing Consultant to the Council (K29), and White. This was White's first assignment as Consultant (G118).

1. Citations to parts of the transcript of the trial in District Court are given first to the volume designation and then the page number, as (G16). The second citation, where given, refers to the volume of the appendix filed in the Third Circuit and the page number within the volume, as (AV III, a37). Citations to petitioner's brief here are made thus: (PB5).

2. His duties as Consultant are described at G21-23.

DLS was found lacking in almost every regard: administration, faculty, library, student quality and physical plant. The summary in the inspectors' report is the basis of plaintiff's first defamation claim.

The Accreditation Committee and the Council, in February, 1974, considered the application, and Avins appeared before both bodies. Provisional approval was denied.

At the request of DLS, a second inspection was held in May, 1974. White was not a member of the team. During this inspection, an inspector criticized the library for not containing the U. S. Code Service. That night, students went to Washington, D. C., secured the books, and had them shelved the next morning[3] (F49-52). The second inspection report, which did not involve White's participation (K124), criticized many aspects of DLS.

During the spring of 1974, a group of interested lawyers and judges whose sons and/or daughters attended DLS formed a "Judges Committee" to render assistance to DLS in obtaining accreditation (I11-12).

In July, 1974, the Accreditation Committee and Council met to consider the second report. Avins addressed both bodies. Provisional approval was again denied. The Council also adopted a resolution that DLS was not making satisfactory progress under its present administration.

Thereafter, the Judges Committee met with Avins to assess DLS' situation. Avins felt he was the stumbling block (I20). Judge DiBona volunteered to go to the August Council meeting in Hawaii to learn what he could about DLS' situation (I23).

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3. This incident is not reflected in the body of the second team's inspection report. However, it is important background for plaintiff's third defamation claim.

To assist DiBona, Avins gave him a resolution of the board of trustees of DLS which established three committees to improve DLS (I13; AV III, a37).

Prior to his trip to Hawaii, DiBona, at Avins' request, addressed a student meeting and persuaded the students to do nothing until after his trip to Hawaii (I23-26; AV III, a40-43).

In Hawaii, DiBona was able to present the board of trustees resolution to White (I14-15; AV III, a38-39). He also talked to a number of persons connected with the Council (I29-37). DiBona left convinced that Avins had to resign as Dean. He relayed this to Avins upon his return (I38; AV III, a44).

On August 23, 1974, White visited DLS at Avins' request to attend a meeting of the board of trustees (K208; AV III, a61). The board did not meet. Instead, there was a luncheon meeting attended by Avins, Assistant Dean John Tovey, Judge DiBona, and White (K209; AV III, a62). The meeting involved a wide discussion of DLS' situation and the "book incident" was touched upon. According to Avins, White said or implied that Avins' actions amounted to some sort of fraud (F79; AV III, a31). DiBona's testimony differed slightly but clearly reflected White's critical opinion of Avins' conduct (I58-60; AV III, a46-48). White's comments are the basis of plaintiff's third defamation claim (O92-93; AV III, a81-82).

Avins resigned as dean on September 8, 1974 (F89). About a week later, Arthur Weeks became the second dean of DLS.

A third inspection had already been scheduled for late Fall of 1974. At Weeks' request, it was delayed (L207-208). Weeks requested that one of the inspectors have prior knowledge of DLS. White suggested that he come, and Weeks agreed (L214-216). The third inspection was held in January, 1975. The third report noted improvements but still recommended denial of provisional

accreditation. The summary in the third report provides the basis for Avins' second claim of defamation.

In February, 1975, the Council and the Accreditation Committee met. A delegation from DLS headed by Weeks addressed both bodies but still failed to obtain provisional approval. The Council and the Accreditation Committee deferred approval until a fourth inspection could be held (L224).

After returning to DLS, Weeks suggested affiliation with a college or university (L227). On April 12, 1975, a decision was made to affiliate DLS with Widener College (L230).

In May, 1975, a fourth inspection was held. White was not on the team. By this time, the DLS board had agreed to affiliate, and provisional approval was recommended.

In July, 1975, the Accreditation Committee met in Chicago and voted again to defer provisional approval. The next day the Council reversed the Accreditation Committee and recommended provisional approval which was granted in August, 1975 (L236).

In 1976, Weeks filed a set of grievances against the plaintiff in connection with his tenured position on the faculty (L232). White had nothing to do with the filing of the charges (L232) and was not consulted before they vere filed (L233). Plaintiff was dismissed as a tenured faculty member on April 20, 1978. White had no part whatsoever in the grievance committee hearings or in the decision to dismiss Avins (E211-212).

In August, 1978, the House of Delegates of the ABA granted full approval to DLS (B61).

ARGUMENT

Generally, the New York Times v. Sullivan Issues Herein Do Not Present Questions Warranting Review Since All Comments in Question Concern a Public Matter About a Public Figure and Were Made by a Person Exercising an Important Societal Function Requiring an Expression of Candid Views and No Self-Censorship.

Although presented as separate issues, each of petitioner's first six "questions presented" concern the application to this case of *New York Times v. Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and its progeny. Application of *New York Times* depends on the nature of the controversy and "the nature and extent of an individual's participation in the particular controversy giving rise to defamation," *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 352, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

The general nature of the controversy here is educational. The specific nature of the controversy is the struggle of DLS to obtain provisional accreditation from the ABA.

Petitioner was the founder of DLS, its dean during the formative years and at the time of the first two inspections, and a faculty member and member of DLS' board of trustees during the entire accreditation struggle. Respondent is the consultant to the ABA on matters involving the accreditation of law schools. On two occasions, he was also an inspector and co-author of reports on whether the DLS should receive provisional accreditation. All three alleged statements at issue were made by respondent in his capacity either as inspector or as consultant

and all were related to the matter of whether DLS should be granted provisional accreditation.

This Court and others have consistently held that educational controversies are "public" and persons centrally embroiled in the dispute are "public figures" with the *New York Times* rule, *Pickering v. Board of Education,* 391 U. S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Kapiloff v. Dunn,* Ct. Sp. App. Md., 343 A. 2d 251 (1975) cert. den'd 426 U. S. 907, 96 S. Ct. 2228, 48 L. Ed. 2d 832 (1975) (high school principal); *Basarick v. Rodeghero,* Ill. App., 321 N. E. 2d 739 (1974) (various teachers and athletic coaches); *Gallman v. Carnes,* 254 Ark. 987, 497 S. W. 2d 47 (1973) (assistant dean and law school professor's "qualification as a scholar and professor of law involve matters of public or general concern," p. 50); *Reaves v. Foster,* 200 So. 2d 453 (Miss. 1967) (school principal); *Time, Inc. v. Johnston,* 448 F. 2d 378 (4th Cir. 1971) (college basketball coach); *Grayson v. Curtis Publishing Co.,* 72 Wash. 2d 999, 436 P. 2d 756 (1968) (college basketball coach); *Johnson v. Board of Junior College Dist. #508,* 31 Ill. App. 3d 270, 334 N. E. 2d 442 (1975) (college faculty member).

The alleged statement for which a new trial is ordered took place at a luncheon involving four persons, Avins, White, DiBona and Assistant Dean Tovey. Although this type of setting may not be considered traditional "media," the subject of the meeting was the DLS accreditation struggle. However, *New York Times* is a rule of constitutional protection. This Court and others have held that educational matters are sufficiently important that comments thereon, even private comments, are constitutionally protected; *Givhan v. Western Consolidated School District,* 439 U. S. 410, 99 S. Ct. 693, 58 L. Ed. 2d 619 (1979); *Stone v. Board of Regents University System,* 620 F. 2d 526, 528, ftn. 3 (5th Cir. 1980).

The Third Circuit's Application of the New York Times Rule in Matters Involving Law School Accreditation Is Consistent With This and Other Courts' Decisions Recognizing the Societal Importance of Educational Matters.

Petitioner first argues (PB21-23) that the Court of Appeals extension of the *New York Times* rule into matters of confidentiality warrants review. In fact, there was no per se extension of the *New York Times* rule into areas of confidentiality without real public interest.[4] It was comments germane to the accreditation process that were entitled to *New York Times* protection:

> "We believe the importance of the accreditation process underscores the need for extension of the *New York Times* privilege to a private individual criticizing a public figure in the course of commenting on matters germane to accreditation. An accreditation evaluation by its nature is critical; the applicant school invites critical comments in seeking accreditation. In order to succeed, individuals involved in the accreditation process need to be assured that they may frankly and openly discuss accreditation matters. White, in criticizing Avins at the luncheon, was expressing a candid view of Avins' conduct during the accreditation process. To require an individual like White to insure the accuracy of his comments on accreditation matters would undoubtedly lead to self-censorship which will jeopardize the efficacy and integrity of the accreditation process itself. Since the public is vitally affected by accreditation of educational institutions, we believe that self-censorship in the accreditation process would detrimentally affect

4. The Third Circuit took pains to avoid extending the *New York Times* rule to all confidential communications (Slip op., p. 23, ftn. 5).

> an area of significant social importance." (Slip op., p. 21)

It is the social importance of the accreditation process that provides the basis for applying the *New York Times* rule. In that regard, the Third Circuit's opinion merely follows this and other courts' decisions recognizing the importance of educational matters, *Pickering v. Board of Education, supra; Kapiloff v. Dunn, supra; Basarick v. Rodeghero, supra; Gallman v. Carnes, supra; Reaves v. Foster, supra; Time, Inc. v. Johnston, supra; Grayson v. Curtis Publishing Co., supra; Johnson v. Board of Junior College Dist. #508, supra.* By focusing its holding on educational matters, the court below does not threaten the business and private confidences petitioner seeks to protect (PB22).

Petitioner cites *Snepp v. United States,* — U. S. —, 100 S. Ct. 763, 62 L. Ed. 2d 704 (1980) petition for reh. den'd — U. S. —, 100 S. Ct. 1668, 64 L. Ed. 2d 250 (1980) (PB22). Snepp, an ex-CIA agent, breached his signed employment agreement that he would agree to CIA review of any material he sought to publish about his activities. When Snepp published his book on his activities in Vietnam, the government sought to impose a constructive trust upon the profits of his book to deter future information leaks. The principal distinguishing aspect of *Snepp v. United States, supra,* is stated in footnote 3 where the Court noted:

> "The government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign services . . . The agreement that Snepp signed is a reasonable means for protecting this vital interest."

The distinction is patent. White was acting on behalf of an organization charged with an important societal function—the accreditation of law schools. Snepp acted on behalf of himself, was motivated by profits and risked the exposure of national security information.

The Third Circuit's Findings That the Accreditation Struggle Was a "Public Concern" and That Petitioner's Role Therein Made Him a "Public Figure" Is Amply Supported by the Record and Consistent With This and Other Courts' Prior Holdings That Educational Matters Are "Public Concerns" and Persons Embroiled Therein "Public Figures."

Petitioner argues (PB23-25) that the ruling below is an extension of the *New York Times* rule into all controversies arising out of license applications. DLS' application for accreditation as such was merely a formal, mechanical step which began the public controversy of its accreditation struggle. It is not the accreditation applications as such which make the *New York Times* rule applicable but the years-long public controversy concerning them into which petitioner injected himself. The application of *New York Times* followed the application of the two-part *Gertz* test by considering:

> ". . . whether (1) the DLS accreditation struggle was a public controversy and (2) if so, whether Avins voluntarily injected himself into that controversy." (Slip op., p. 19)

In holding that the DLS accreditation struggle was a public controversy, the Third Circuit relied on these facts:

> "Although DLS was formed and operated as a purely private law school, its success or failure was of importance to the Delaware State Bar as well as to any individual interested in attending an ac-

credited law school in Delaware. It is the only law school in the State of Delaware. Accreditation of DLS would create a new source of attorneys who could qualify to take the Delaware Bar examinations and be admitted to practice in the state. Furthermore, a majority of DLS students were from out of state. Thus, DLS' accreditation would also affect the interests of students from a variety of locales and admission to State Bars outside of Delaware.

Further, there is evidence in the record that mass meetings were held and that individuals from other states concerned about DLS visited the school. The local news media, as well as the Delaware Bar Association, publicized the events surrounding DLS' formation and struggle for accreditation." (Slip op., p. 19)

The ruling is consistent with the previously cited cases holding educational matters to be public controversies.

In finding that Avins was a "public figure" in the accreditation struggle, the Third Circuit relied on these facts:

"We have no difficulty in concluding that Avins voluntarily injected himself into the controversy surrounding DLS' accreditation. As creator, chief architect, and the first dean of DLS, Avins spearheaded its drive toward accreditation. Indeed, the first major hurdle which Avins had to surmount in behalf of DLS was accreditation. The record reveals that from the outset Avins, as dean, was actively involved in every facet of the accreditation struggle. He, in fact, invited the first three accreditation teams to inspect DLS and he personally presented DLS' case before the Council and Accreditation Committee. Unlike the plaintiffs in Firestone, supra, Hutchinson, supra, and Wolston, supra, Avins was not involun-

> tarily dragged into a controversy not of his own making. It was Avins who as dean of DLS officially requested, invited, and affirmatively invoked the accreditation process of the American Bar Association. We therefore conclude that Avins played an affirmative and aggressive role in the accreditation process and that he was a public figure for that limited purpose." (Slip op., p. 20)

Here, the application for accreditation is considered. However, as the court noted, it was one part in petitioner's constant effort to inject himself into every facet of the accreditation controversy. If there is anything in this case which is beyond dispute, it is petitioner's active and central role at DLS during the accreditation struggle. He clearly "invite[d] attention and comment," *Gertz, supra,* 418 U. S. at 345, 94 S. Ct. at 3009, to himself. As such, he was held to be a public figure—a holding consistent with the previously cited cases holding educational matters to be public controversies and the persons involved limited public figures.

The conclusions by the Third Circuit that the accreditation struggle was a "public concern" and Avins a "public figure" are fully supported in the record.[5]

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5. At trial, petitioner himself noted the many meetings called to discuss his role. He testified ". . . there were other mass meetings, small meetings, big meetings, little meetings, people came from New York to talk to me . . ." (F83). Newspaper articles concerning "Avins Law School" appeared (F87, 89).

Petitioner's claim that he is not a public figure is inconsistent with his own activities. In *Avins v. Widener College,* 421 F. Supp. 858 (D. Del. 1976). He sought to require Widener College to honor a September 8, 1974, board of trustees resolution which, referring to Delaware Law School, would have required designation of the library as the "Dean Alfred Avins Law Library," designation of the main classroom building as "Avins Hall" with an appropriate plaque or other exhibition and a formal portrait of him

Viewed in this context, the cases relied on by petitioner are distinguishable and were distinguished by the Third Circuit to the extent the petitioner cited them to it (Slip op., pp. 17-18). In *Hutchinson v. Proxmire,* 443 U. S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979), there was ridiculing comment concerning a behavioral scientist's laboratory research on the emotional behavior of primates. The research was not secret or something that plaintiff would wish to keep from the public, but he made no effort to publicize the research or in any way gain attention for it. The comment ridiculing the research was without any approval or cooperation on the part of the plaintiff. Here, petitioner initiated the accreditation proceedings and inspections and repeatedly and pointedly focused attention upon himself as the center of the struggle.

Time, Inc. v. Firestone, 424 U. S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976) involved an article describing the extra-marital affairs of respondent and her husband as revealed in divorce litigation. The offending statements were based on matters considered highly personal and private to the plaintiff and would have gone unpublicized except for the intervention of the defendant. In *Firestone,* both the matter disclosed and commented upon as well as the entire underlying divorce litigation was a subject which the plaintiff would have preferred to remain unknown. Here, exactly the opposite situation prevails. DLS' accreditation struggle was a most public matter, as was petitioner's ongoing determination to be and to remain DLS' central figure.

Petitioner relies on *Dixson v. Newsweek, Inc.,* 562 F. 2d 626 (10th Cir. 1977). Dixson, prior to being fired

5. (Cont'd.)

to be displayed at the school, 421 F. Supp. at 859, ftn. 2. Private persons, within the meaning of the Supreme Court's ruling, do not seek judicial redress when they do not receive the public acknowledgment they demand.

by new management, was Scheduling Vice-President of Frontier Airlines, a regional carrier based in Colorado. An article in Newsweek Magazine about the financial turnaround of Frontier Airlines portrayed Dixson as, at the very least, an incompetent business executive. Dixson had made no effort to gain public attention from his work. Dixson, therefore, had a non-public plaintiff status similar to that of the plaintiff in *Hutchinson v. Proxmire, supra.*

The Third Circuit's Application of the New York Times Rule to a Private Comment on Educational Matters Does Not Conflict With Prior Rulings Refusing to Apply the New York Times Ruling to Credit Reports.

Petitioner next argues (PB25-28) that application of the *New York Times* rule to a private comment requires review. His argument is structured as follows: (1) Credit reports are matters of public concern (PB26); (2) however, other courts refuse to apply *New York Times* to credit reports; and (3) thus, a conflict exists among the circuit courts warranting review (PB28).

Petitioner's argument fails at its very beginning. Financial credit reports are not matters of public concern, as held by the very cases he cites, *Kansas Elec. Supply Co. v. Dun & Bradstreet, Inc.*, 448 F. 2d 647 (10th Cir. 1971) (financial reports are not a matter of "real public interest," p. 649); *Hood v. Dun & Bradstreet,* 486 F. 2d 25 (5th Cir. 1973) (credit reports do not fall within the definitions of matters of general or public interest, p. 30); *Grove v. Dun & Bradstreet,* 438 F. 2d 433 (3rd Cir. 1971) cert. den'd 404 U. S. 898, 92 S. Ct. 204, 30 L. Ed. 2d 175 (1971) (credit reports not a matter of "real public interest," p. 436); *Harley-Davidson Motorsports v. Markley,* 568 P. 2d 1359 (1977) (forged customer complaint letter sent to corporate headquarters involved no public figure as plaintiff and no issue of public concern and no media defendant, p. 1362).

Petitioner cites *Mid-America Food Service v. ARA Services, Inc.*, 578 F. 2d 691 (8th Cir. 1978) (PB27, 35) although it actually supports respondent's position. Petitioner specifically cites footnote 5 at page 697. There, the Eighth Circuit noted that in any defamation case without media involvement the court must engage itself in a "*Gertz*" type balancing before the *New York Times* rule can be applied. This is exactly what the Third Circuit did below in considering first whether the DLS accreditation struggle was a public controversy and second if Avins voluntarily injected himself into that controversy (Slip op., p. 19).

The Third Circuit carefully distinguished the instant case from credit report situations (Slip op., p. 23, ftn. 5):

> "We do not believe that our decision today conflicts with Grove v. Dun & Bradstreet,, Inc., 438 F. 2d 433 (3d Cir.) *cert. denied,* 404 U. S. 898 (1971). In *Grove,* a corporation brought a libel action against the defendant who had issued an allegedly false credit report to its subscribers. We held that the *New York Times* privilege did not apply to the dissemination of a private credit report. *Grove,* however is distinguishable from the present case. In *Grove* we held under the pre-*Gertz* test of public figure status as involving a matter of legitimate public concern, Rosenbloom v. Metromedia, Inc., 415 F. 2d 892 (3d Cir. 1969) *aff'd,* 403 U. S. 29 (1971), plaintiff's business or credit standing was not a matter of real public interest. See 438 F. 2d at 436-37. In the instant case, we have concluded that the DLS accreditation struggle was a public controversy.
>
> In *Grove,* we also indicated that the medium in which the defamatory statement was communicated—a private subscription credit reporting service—did not entitle the defendant to the *New York Times*

privilege. See 438 F. 2d at 437. This language is arguably dicta and may be limited to the situation of commercial credit reports. *See generally* Hood v. Dun & Bradstreet, 486 F. 2d 25, 29 (5th Cir. 1973), *cert. denied*, 415 U. S. 985 (1974). Even if this language is not dicta, we believe *Grove* is nonetheless distinguishable. The subscribers to the credit reports had only a generalized interest in the defendant's report on the plaintiff corporation whereas in the instant case, all those present at the luncheon had a vital interest in the accreditation controversy. Thus, the forum in the instant case militates in favor of application of the *New York Times* privilege to insure that discussion be robust and uninhibited."

As made clear by the last sentence of the above quote, the entire thrust of the application of *New York Times* here is to foster discussion among interested persons on matters of societal importance. As such, the ruling below conflicts with no prior ruling of any court.

In *Doman v. Rosner*, Pa. Super., 371 A. 2d 1002 (1977), the directors of a medical institute sued an organization preparing an unfavorable report of it and them. Noting the societal importance of the institute, the *New York Times* rule was applied even though the report in question was private.

In providing constitutional protection to comments made in a small group under the circumstances here, the Third Circuit's ruling simply applied the *New York Times* decisions involving public educational controversies [6] and

6. *Pickering v. Board of Education, supra; Kapiloff v. Dunn, supra; Basarick v. Rodeghero, supra; Gallman v. Carnes, supra; Reaves v. Foster, supra; Time, Inc. v. Johnston, supra; Grayson v. Curtis Publishing Co., supra; Johnson v. Board of Junior College Dist. #508, supra.*

those decisions affording constitutional protection to private comments on educational affairs.[7]

The Circuit Courts are in accord that classroom discussion is sufficiently important to be a constitutionally protected activity, *Kingsville Independent School District v. Cooper,* 611 F. 2d 1109, 1113 (5th Cir. 1980); *Minarcini v. Strongsville City School District,* 541 F. 2d 577 (6th Cir. 1976); *Keefe v. Geanakos,* 418 F. 2d 359 (1st Cir. 1969). It would be anomalous if the courts held that classroom discussion is entitled to constitutional protection but a person charged with the societal duty of determining whether that classroom discussion is of sufficiently high caliber to warrant accreditation is not afforded similar protection—regardless of the forum of the discussion.

The Third Circuit's Characterization of Certain Allegedly Defamatory Comments as Opinion Is Consistent With This and Other Courts' Holdings on What Constitutes an Opinion and the Constitutional Protection Afforded Opinions.

Petitioner next argues (PB28-30) that an important question is presented by the application of the *Gertz* opinion rule to intangible evaluations in accreditation reports. This Court has already held that opinions are constitutionally protected, *Gertz v. Robert Welch, supra,* 418 U. S. at 339-340, 94 S. Ct. at 3007:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend on its correction not on the conscience of judges and juries but on the competition of other ideas."

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7. *Givhan v. Western Consolidated School District, supra; Stone v. Board of Regents University System, supra.*

Petitioner challenges the proposition that an "intangible criterion" is an "opinion" because there was testimony that the offending statement lowered the witness' estimation of petitioner (PB29). The argument is a non sequitur. Opinions are supposed to create reactions in the reader, *Kapiloff v. Dunn, supra* at 260.

Petitioner asserts "intangible evaluations" are "routinely" held actionable, citing *Arctic Co. Ltd. v. Loudon Times-Mirror,* 624 F. 2d 518 (4th Cir. 1980) (PB29). Simply put, *Arctic* did no such thing. Arctic Co. was not a "public official" or a "public figure." *Arctic* supports the Third Circuit in measuring a "public" figure by whether it was well known in the community and whether it did "press itself" into the controversy. No person was better known in DLS and the accreditation effort than Avins, and no person pressed himself more eagerly into the controversy.

"Intangible" evaluations or criteria such as "fascist," "fellow traveler" or the like are non-actionable opinions, *Buckley v. Littell,* 539 F. 2d 882, 893 (2d Cir. 1976) cert. den'd 429 U. S. 1026, 97 S. Ct. 785, 50 L. Ed. 2d 777 (1977).

Petitioner asserts that the reports were not subject to "correction" by public debate. This is irrelevant with reference to opinions. In any event, before the Council voted on approval, Avins, as dean, had the opportunity to "correct" the reports and availed himself of this opportunity extensively (F40-42, 67-70). Similarly, Weeks addressed the ABA when the third report was considered (L24, 25) and, most importantly, it was Weeks' opportunity to comment on the fourth report which resulted in the Council's reversal of its own Accreditation Committee's recommendation and the granting of provisional accreditation to DLS.

The Third Circuit Did Not Invade the Province of the Jury in That It Only Held That Certain Matters Were, as a Matter of Law, Not for Jury Consideration. No Finding of Fact Contrary to the Jury Was Made.

Petitioner next argues (PB31-32) that the facts constitute sufficient evidence to support a jury verdict and, accordingly, the Court of Appeals' reversal was an invasion of the jury's province.

The Third Circuit reversed the jury's verdict because the first and second defamation claims were held to be non-actionable opinions that should not have been submitted to the jury (Slip op., pp. 9-10). There is no "province" to invade when the jury should not have been allowed to consider the question in the first place. In defamation cases, the appellate court must "make an independent examination of the whole record" to decide for itself whether there was a statement the Constitution protects, *New York Times v. Sullivan, supra, Buckley v. Littell, supra.*

Petitioner's authorities *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Inc.*, 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962), *reh. den.* 369 U. S. 882, 82 S. Ct. 1134, 8 L. Ed. 2d 284 (1962) and *Dennis v. Denver & R. G. W. R. Co.*, 375 U. S. 208, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963) are negligence actions. As such, the appellate court's duty is to search the record for evidence which may support the verdict.

The Third Circuit's Alleged Sub Silentio Ruling Regarding F. R. C. P. 51 Is Consistent With Holdings in the Other Circuits That Objections Are Not Waived When a Party's Position Has Been Consistent Throughout the Entire Course of Litigation and Further Objection Would Have Been Unavailing.

Petitioner contends that a question of construction of F. R. C. P. 51 requires the consideration of this Court (PB33-35). The respondent had moved for summary judgment prior to the trial and for a directed verdict at the end of the petitioner's case (I5), as well as at the end of the evidence (N135). It had been at all times and remains the respondent's position that nothing said or written by the respondent at any time defamed the petitioner. It was not the understanding of respondent's counsel that these points already made by the respondent and rejected by the court needed to be restated in the course of the conference on jury instructions. The same was true with reference to the intentional interference claim and the mental distress claim. It was the understanding of respondent's counsel that the conference was concerned with phraseology and statements of legal principles, not with the question of whether specific issues should be submitted to the jury. It was for this reason that counsel, in the course of the conference, reserved the issue of the quantity of proof required to recover on the defamation claim [8] while not discussing the question of whether specific items of alleged defamation should be submitted. Respondent's counsel had already made clear they considered none of them to be defamation.

The discussion in chambers on the court's instructions concerning the charges of defamation, while it may in retrospect appear obscure, can be understood in terms of

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8. The *New York Times v. Sullivan, supra,* matter.

the litigation background of the defamation claim and the preparation of the instructions on the claim (N140-1).

Petitioner's answers to respondent's interrogatories (Docket Nos. 15 and 16) [9] show a vast quantity of contentions on the part of the petitioner concerning the specific instances of alleged defamation including 15 writings and a general statement of "numerous" conversations slandering petitioner (not including the luncheon). It was as to all of these contentions that the respondent moved for summary judgment. The denial of the summary judgment motion did not discuss any of the facts or limit the defamation claim in any way. In the District Court's letter of February 1, 1978, the court was careful to note that it did not intend to foreclose any tender of evidence of defamation at the pre-trial conference or trial (AV, IV, b5-6). Petitioner's proposed pre-trial order (Docket No. 83) did not narrow the defamation claims from the large quantity of such claims identified in the answers to interrogatories. Although the District Court said there "was not much of a pre-trial order" (N141), actually there was none at all. The petitioner's proposed instructions on defamation did not identify any statements alleged to be defamatory but proposed simply to instruct on the applicable law. Although the court referred to the pre-trial conference in connection with the charges, there was no order of any kind that there was any limitation on the defamation charges and respondent's counsel had, and have, no recollection of any such understanding. In short, up to the beginning of trial, nothing in the court's rulings, or the contentions by the petitioner gave any indication that the court would limit the petitioner's contentions concerning defamation in any way at all.

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9. Docket No. refers to the docket in the U. S. District Court for the District of Delaware, *Avins v. White*, C. A. 76-134.

The petitioner's opening statement identified certain areas of alleged defamation including specific parts of the January, 1974, report and also, not previously noted by the court in the February 1 letter, parts of the January, 1975, report and the luncheon incident. Since the court had already ruled it would not limit the defamation claims petitioner might make at trial, it seemed apparent that any defamation claim petitioner wanted to assert would be before the jury. At least respondent's counsel could not assume that the court would limit the defamation claims to those mentioned by the petitioner in his opening. Nothing in the entire course of the proceedings to that point indicated that they would be so limited. Nothing in the petitioner's proposed instructions indicated that he considered the claims to be limited by his opening remarks.

In the final conference on jury instructions it appeared that the court, unrequested by either party to do so, would instruct on three specifically identified occasions of alleged defamation. Until that time, there was no indication that the court would identify specifically the instances of alleged defamation. The petitioner had chosen not to limit his proposed defamation instruction in that manner and, since the respondent did not believe that there were any instances of defamation in any of the statements made by respondent, there was no logical basis on which the respondent could identify the allegedly defamatory statements in preparing his instructions.

It is in the context of this background that the respondent's counsel in the discussion of the defamation instructions expressed his agreement that the defamation claims should be limited to those identified by the court (N140-141). It was at least an improvement over the prospect of the petitioner arguing whatever he saw fit as constituting defamation. There was certainly never intended to be any implication of a change in respondent's

position to agree that the specificities identified were in fact allegations of defamatory action on the part of the respondent. Respondent submits that the fact that there had already been unsuccessful motions on three occasions for judgment in his favor (summary judgment and two motions for a directed verdict) clearly shows the respondent's unwavering position that there was no defamation at all. Surely nothing could be more clear than the respondent's position that, whether there was one or twenty alleged acts of defamation, respondent believed that none of them should be submitted to the jury.

The District Court, in rejecting respondent's motion for a new trial, speculated about the thought process of respondent's counsel and the possibility that counsel may have refrained from objecting to one of the allegations of defamation on the ground that they may have wanted to avoid the risk of reversal (AV IV, b49). Since respondent repeatedly requested a directed verdict and previously requested summary judgment, it is submitted that the court's speculation does not attribute to respondent's counsel a logical course. In any event, in view of the court's introduction of its speculation into the opinion, it may be appropriate for respondent's counsel to respond emphatically that there was no such reservation on their part. They believed it was clear throughout that any charge on defamation or on any specificity of alleged defamation was already disputed and objected to and such objection had been overruled.

In discussing Rule 51, it is stated in Wright & Miller, Federal Practice & Procedure, Vol. 9, § 2553, p. 639, that:

> ". . . The failure to object may be disregarded if the party's position has been clearly made to the court and it is plain that a further objection would be unavailing."

To the same effect is *Brown v. Avemco Inv. Corp.*, 603 F. 2d 1367 (9th Cir. 1979); *Robinson v. Heilman*, 563 F. 2d 1304 (9th Cir. 1977); *Stewart v. Ford Motor Co.*, 553 F. 2d 130, 140 (D. C. Cir. 1977); *Ind. Dev. Bd. of Tn. of Section, Ala. v. Fuqua Indus.*, 523 F. 2d 1226 (5th Cir. 1975), reh. den. (1976); *Sweeney v. United Feature Syndicate*, 129 F. 2d 904 (2nd Cir. 1942); 5A Moore's Federal Practice, § 51.04, p. 51-28.

Petitioner's authorities (PB34-35) are distinguishable. In *Rogers v. Baltimore & O. R. R. Co.*, 325 F. 2d 134 (6th Cir. 1963), the court removed one of plaintiff's key issues from the jury's consideration thereby significantly altering the course of the trial. Defendant's failure to object was deemed a waiver. In *Mid-America Food Service v. ARA Services, Inc., supra,* counsel was deemed to have waived his objection on a matter which, during trial, he encouraged and agreed upon. In *Miller v. New York Cent. R. R.*, 293 F. 2d 10 (7th Cir. 1956), the objection raised post-trial concerned a matter never called to the attention of the court during trial.

Here, there were no major court rulings during trial which significantly altered its course, respondent's counsel never encouraged or agreed to the submission of the defamation claims to the jury and constantly made known its complete opposition to the submission of any of the defamation claims to the jury.

The Third Circuit's Remand for a New Trial Is Consistent With This and Other Courts' Holdings That a New Trial Is Required When a General Verdict Is Based on More Than One Claim, One of Which Has Been Improperly Submitted to the Jury.

Petitioner next argues (PB35-37) that there is a conflict among the circuits on the issue of whether a general verdict may be reversed when supported by only one valid

claim. He relies on *Buckley v. Littell, supra,* where the court, rather than granting a new trial on the one valid claim, granted a remittitur or ordered a new trial on damages only. However, the *Buckley* court labeled its situation unusual insofar as the relief granted, 539 F. 2d at 896. Other courts routinely hold that general verdicts supported by invalid claims cannot stand.

In *Sunkist Growers v. Winckler & Smith Citrus P. R. Co.,* 370 U. S. 19, 30, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962), this court, citing the earlier case of *Maryland v. Baldwin,* 112 U. S. 490, 493, 5 S. Ct. 278, 28 L. Ed. 822 (1884), stated, with respect to a general verdict which could have been based on either a valid or invalid instruction:

> "It generally prevents from proceeding upon which plea they found. If, therefore, upon any one issue error was committed, either in admission of evidence or in the charge of the court, the verdict cannot be upheld."

This rule has been consistently followed, not only in the Third Circuit, *Rea v. Ford Motor Co.,* 497 F. 2d 577, 591 (3rd Cir. 1974) cert. den'd 419 U. S. 868, 95 S. Ct. 126, 42 L. Ed. 2d 106 (1974), but other Circuits as well,, *Hayes v. Solomon,* 597 F. 2d 958, 985 (5th Cir. 1979); *Russell v. City Ice & Fuel Co.,* 539 F. 2d 1318, 1321 (4th Cir. 1976).

The Third Circuit Correctly Upheld the Jury's Verdict on the Interference Claim Since the Trial Court's Instructions on Proximate Cause Would Not Result in a Unique Verdict Which Might Differ From State to State.

Petitioner finally argues (PB38-39) that an undecided question exists on what proximate cause elements are

necessary for tort denial of constitutional rights, relying on *Carlson v. Green*, — U. S. —, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980). *Carlson* held that if an action is based on federal law then, to the extent state statutes would result in different results (abate or non-abatement of action depending on wording of state survival statute), federal common law, not state law, would apply. Even assuming petitioner is correct that his tort action is based on federal law, the causation instruction [10] given by the trial court is not contrary to any federal law nor will it lead to different results from state to state. Accordingly, state law is properly applied, *Farmer v. United Broth. of C. & J. of America, Local 25*, 430 U. S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977).

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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10. The jury charge on causation (O116-118; AV III, a105-107) is consistent with *Restatement of Torts, 2d*, §§ 622A and 767(f) and comment (h) thereon.